1998

Pomodora Partnership, fka Pomodoro Limited Partners dba Pomodoro Restaurant v. Hillside Plaza, Ltd. dba Hillside Plaza Properties, and John Does 1 through XX : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS NO. 980277-CA

POMODORO PARTNERSHIP, fka POMODORO LIMITED PARTNERS dba POMODORO RESTAURANT,	:	
Plaintiff and Appellant,	:	
vs.	:	
HILLSIDE PLAZA, LTD. dba HILLSIDE PLAZA PROPERTIES, and JOHN DOES I through XX,	:	Case No. 98 0277-CA
	:	Priority 15
Defendants and Appellees.	:	

BRIEF OF APPELLANT POMODORO PARTNERSHIP

Appeal from Judgment Entered in the
Third Judicial District Court in and for Salt Lake County, Utah
Honorable Stephen Henriod, Presiding

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STATEMENT OF JURISDICTION OF APPELLATE COURT

The Court of Appeals has jurisdiction in this matter pursuant to Section 78-2a-3(2)(i), Utah Code Annotated (1953), as amended.

STATEMENT OF THE ISSUES

1. Did the trial court err in failing to conclude that there were various material controverted facts?

2. Did the trial court err in failing to conclude that such material controverted facts, if found in favor of the Appellant, could be the basis for the application of various principles of equity which would operate to establish that timely notice of renewal was given?

3. Did the trial court err in failing to conclude that such material controverted facts, if found in favor of the Appellant, could be the basis for a course of dealing which modified or amended the lease agreement between the parties?

STANDARD OF REVIEW

A trial court's grant of summary judgment should be upheld only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law Rule 56(c) of the Utah Rules of Civil Procedure; and Andreini v. Hultgren, 860 P.2d 916 (Utah 1993).

A trial Court's decision to grant or deny a Motion for Summary Judgment is a legal one and will be reviewed for correctness. The Appellate court will grant no deference to the trial court's legal conclusions. Salt Lake City v. Silverfork Pipeline, 913 P.2d 731 (Utah 1995).

STATEMENT OF THE CASE

The Appellant seeks to have the Summary Judgment entered by the Third Judicial District Court in and for Salt Lake County, Utah, the Honorable Stephen L. Henriod presiding, reversed and vacated, and to have the case remanded to the District Court for evidentiary proceedings. The Appellant filed its complaint in the Third Judicial District in and for Salt Lake County, Utah on or about November 7, 1997. On January 23, 1998, the District Court heard oral argument on the Appellee's Motion for Summary Judgment. Thereafter, on February 24, 1998, the District Court entered Summary Judgment. On March 4, 1998, the Appellant filed a Motion to Alter or Amend Judgment pursuant to Rule 59(e) of the Utah Rules of Civil Procedure, District Court entered an Order to Amend Judgment on March 24, 1998. The Appellant timely filed its Notice of Appeal on March 30, 1998, and its Docketing Statement on April 20, 1998.

RELEVANT FACTS

1. On or about August 25, 1992, the Defendant/Appellee, Hillside Plaza, Ltd. ("Hillside"), as landlord, and K.B. Foods, Inc., as tenant, entered into a commercial lease agreement (the "Lease"). (Complaint, ¶4.)

2. By virtue of a written Assignment of Lease executed on or about July 1, 1994, K.B. Foods, Inc. assigned all of its right, title and interest in and to the Lease to the Plaintiff/Appellant, Pomodoro Partnership (Pomodoro"), which assignment of Lease was approved and accepted by Hillside. (Complaint,¶5.)

3. Subject to an attachment to the Lease which is captioned "Renewal Option", the term of the Lease would have expired on December 31, 1997. The Renewal Option provides that

Pomodoro may renew the term of the Lease for an additional five (5) years " . . . by delivering to Landlord written notice of Tenant's exercise of its option to renew the Term at least One Hundred Twenty (120) days prior to the original expiration date of the Term . . . ." (See Hillside Plaza Lease and Renewal Option attached to Hillside's Memorandum in Support of Motion for Summary Judgment as Exhibits "A" and "B".)

4. On or about April 24, 1997, Pomodoro, by and through its general partners Brian Morton and Wendy Caron, met with Hillside's agent, John Johnson. At this meeting, Mr. Morton and Ms. Caron indicated to Mr. Johnson that certain capital improvements to the leasehold premises (especially the installation of a new and additional air conditioner) were necessary. Mr. Johnson advised them that Hillside would not make the improvements and suggested that Pomodoro should do so. The parties discussed the term of the Lease and Pomodoro's right to renew the term. Mr. Morton and Ms. Caron clearly conveyed to Mr. Johnson that, if Pomodoro were to construct the required improvements at its cost, Pomodoro would only do so if it renewed the Lease. (Affidavit of Brian Morton, ¶2, 6, 7, 8 and 9.)

5. Soon thereafter, Pomodoro installed, among other things, a new air conditioner at a cost of approximately Ten Thousand Dollars ($10,000.00); new floors on the leasehold premises at a cost of approximately Eight Thousand Dollars ($8,000.00); a new custom built service station on the leasehold premises at a cost of approximately One Thousand Five Hundred Dollars ($1,500.00); and new wood blinds on the leasehold premises at an approximate cost of Seven Thousand Dollars ($7,000.00). Pomodoro completed these installations prior to September 1, 1997.

Total cost of capital improvements to the leasehold premises by Pomodoro was approximately Fifty Thousand Dollars ($50,000.00). (Affidavit of Brian Morton ¶10, 11, 12, 13 and 14.)

6. Despite Pomodoro's undertaking of substantial and expensive improvements to the leasehold premises, and Hillside's acceptance and approval thereof, Mr. Johnson advised Pomodoro by a letter dated September 3, 1997, that it had failed to renew the Lease by the required date, or September 2, 1997. Upon receipt of Mr. Johnson's letter, Pomodoro immediately served upon Hillside a written notice of its intention to renew the Lease by a letter dated September 8, 1997, which was delivered to Mr. Johnson. (Hillside Reply Memorandum, ¶2; Affidavit of Brian Morton, ¶15, 16 and 18, copy of Morton letter dated September 8, 1997).

7. The delay in the delivery of the written Notice of Renewal was only six (6) days. The failure to have given notice by September 2, 1997, was based upon the prior verbal statements to Mr. Johnson expressing Pomodoro's intention to renew the Lease; the acquiescence of Mr. Johnson to the capital improvements made by Pomodoro and his knowledge that such improvements would not have been made absent an intention to renew the Lease; and the reasonable belief by Pomodoro that it had complied with the renewal provisions of the Lease by giving verbal notice of intent to renew at the meeting between Mr. Morton, Ms. Caron and Mr. Johnson in April, 1997. (Affidavit of Brian Morton, ¶15, 17 and 19.)

ARGUMENT

I. SUMMARY JUDGMENT WAS IMPROPER SINCE THERE ARE GENUINE ISSUES REGARDING MATERIAL FACTS.

Rule 56(c) of the Utah Rules of Civil Procedure permits summary judgment when all pleadings in a matter demonstrate that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Atkinson v. IHC Hospitals, Inc., 798 P.2d 733 (Utah 1990); Heglar Ranch, Inc. v. Stillman, 619 P.2d 1390 (Utah 1980). Additionally, this Court must "review the facts in the light most favorable to the losing party, while giving no deference to the trial court's legal conclusions." Swift Stop, Inc. v. Wight, 845 P.2d 250 (Utah App. 1992).

According to Pomodoro's testimony, Pomodoro stated to Hillside's agent, Mr. Johnson, that Pomodoro would renew the Lease if Pomodoro proceeded with certain capital improvements. Further, Pomodoro submits that Mr. Johnson, as agent for Hillside, acknowledged Pomodoro's position; observed and monitored Pomodoro's construction and installation of the capital improvements; and accepted the capital improvements as a permanent part of the leased premises.

Hillside expressly or impliedly denies the foregoing. It is apparently Hillsides' contention that it was unaware of any decision by Pomodoro to exercise the option to renew the Lease, notwithstanding the substantial improvements (approximately $50,000.00 cost) rendered to the leased premises by Pomodoro, and that there was no specific discussion between representatives of Pomodoro and Hillside wherein the parties understood that the installation of capital improvements by Pomodoro would effectively be the delivery of notice to Hillside of Pomodoro's intention to exercise its option to renew.

Further, Hillside points out that Pomodoro admits that it "forgot about the written requirement" with respect to notice of exercise until after it received Mr. Johnson's letter dated September 3, 1997. However, it is Pomodoro's position, with respect to which Hillside takes exception, that Pomodoro didn't overlook the requirement of a writing, but rather believed, consistent with the understanding between Pomodoro and Mr. Johnson, that a writing was unnecessary under these circumstances.

If the trial court had considered the above facts (rather than have ruled in a strict constructionist matter as is discussed below), it would have been forced to conclude that there are material factual questions to be resolved in this matter and that a trial is required. To have done otherwise, has denied Pomodoro its opportunity to be heard on the merits of its claim.

II. PRINCIPLES OF EQUITY MUST BE CONSIDERED IN CONNECTION WITH ANY RULING WHICH DETERMINES POMODORO'S COMPLIANCE WITH THE LEASE RENEWAL PROVISIONS.

A. The I.X.L. case can be factually distinguished and was incorrectly applied.

In granting Hillside's Motion for Summary Judgment, the trial court concluded that the matter of I.X.L. Furniture and Carpet Installment House v. Berets, 33 Utah 454, 91 P.279 (Utah 1907) was controlling authority. Although the trial court in this matter acknowledged that there were certain unresolved equitable issues, it stated that I.X.L. was "controlling precedent and it is a legal issue and not an equitable one." (Emphasis added) (Transcript of proceedings, pp. 4, 23 and 24) In other words, the trial court adopted a "strict constructionist" approach to the facts of this matter and, in its ruling, considered only whether Pomodoro had exercised the lease renewal privilege in the

manner and in the time required by the Lease. The trial court refused (and stated that it was compelled to refuse) to consider any equitable facts.

Pomodoro submits that the trial court failed to consider two (2) significant aspects of the I.X.L decision. First, although the facts in the I.X.L. matter had several similarities to the facts of this case, it is extremely significant that in the I.X.L. case the term of the subject lease had expired prior to the date that any notice of renewal was delivered. The I.X.L. court noted at p. 282 that:

> The tenancy ceased on the expiration of the lease, and the right to rent terminated with it . . . . Where a notice of any kind is required to obtain a renewal of a lease and a request is no less than a notice, the general rule seems to be that such notice must be given before the expiration of the old lease, or it will be too late . . . [T]he lessor should know the moment the lease expires whether he has or has not a tenant.

The emphasis in the foregoing upon the expiration date of the lease as the last date to renew, is an important factual distinction. The primary term of the Hillside/Pomodoro Lease did not end until December 31, 1997. Hillside acknowledges that Pomodoro delivered written notice of an exercise of the option to renew on September 8, 1997, almost four (4) months before the primary term ended.

Second, the trial court failed to consider that I.X.L. clearly requires an examination of the equities. At the same time as the I.X.L. opinion stressed the importance of recognizing the integrity of contract provisions, it stated the need, in that process, to consider equitable principles. "Courts have no right to disregard any provisions of a contract, or to save rights that are lost thereunder through the act of the party asking relief, **unless it is made to appear that it would**

be unconscionable or clearly inequitable to do or not to do so." (Emphasis added) I.X.L. supra at page 283. Prior to ruling on Hillside's Motion for Summary Judgment, the trial court had a duty, even pursuant to the holding of I.X.L., to review all of the facts which support claims for equitable relief. In order to grant Hillside's Motion, the trial court had a further duty to conclude that such facts, viewed in a light most favorable to Pomodoro, could not support a finding of "unconscionability" or "clear inequity". Indeed, the trial court ignored the equitable facts and made no findings nor reached any conclusions about the equitable issues.

B. The I.X.L. case requires that equitable principles be reviewed in order to determine Pomodoro's compliance with the lease renewal provisions.

Hillside has stated to this Court, and this Court has agreed, that I.X.L. compels the trial court to enforce the terms and conditions of the Lease and prohibited the trial court from evaluating the equities. Pomodoro believes that I.X.L. *requires* a review of equitable claims before there can be any strict enforcement of the provisions of any option to renew.

If equity does not permit Pomodoro to renew the lease, Pomodoro will suffer undue and severe hardship. Pomodoro incurred significant expense when it made capital improvements to the leasehold premises which were otherwise not required of Pomodoro under the Lease. Pomodoro did so based upon Hillside's understanding, communicated to Hillside's agent, Mr. Johnson, that Pomodoro would renew the lease and that Pomodoro would be able to benefit from the capital improvements over the extended term. Coupled with Pomodoro's continuing investment and good will inextricably related to Pomodoro's operation of its business

from the leasehold premises, to deny Pomodoro the ability to renew the Lease under the special circumstances of this matter would accomplish a clear inequity and an unconscionable result.

C. The Geisdorf ruling ratified The I.X.L. requirement that equitable facts be considered.

While the recent ruling of the Supreme Court in Geisdorf v. Doughty, 345 Utah Adv. Rep. 16(6/19/98) reinforced the strict constructionist elements of I.X.L., it underscored and clearly emphasized the trial court's obligation to consider and examine the equities. In particular, Geisdorf declared that "under the totality of the circumstances" there may be "instances in which deviation from strict compliance may be equitable excused." p.7 The trial court has yet to undertake any review of the circumstances which would justify the application of equity in this matter, let alone to make any findings with respect thereto. Clearly, the facts which predicate Pomodoro's equitable claims are disputed by Hillside and Pomodoro is entitled to a review of these facts by the trial court before any judgment can be appropriately entered.

D. The lease renewal provision should not be strictly enforced because Pomodoro did not believe that a written exercise was required.

Although Geisdorf supports the fundamental premise that there should be strict compliance with option provisions, such as the renewal provisions of the Lease, it clearly excuses such strict compliance "when the optionee's conduct in failing to comply was not due to willful or gross negligence on the part of the optionee but was rather the result of an honest and justifiable mistake. . . ." Geisdorf supra at p. 7. citing Cattle Feedings, Inc. v. Jordan, 549 S.W. 2d 29 (Tex. App. 1977).

Representatives of Pomodoro met with Mr. Johnson, as Hillside's representative, in April, 1997. The specific purpose of the meeting was to discuss the need for certain capital improvements to the leasehold premises and the relative responsibilities for the installation thereof. Pomodoro advised Hillside that, if Pomodoro were to construct the required improvements at its cost, Pomodoro would be thereby expressing its intention to renew the Lease. Thereafter, Pomodoro expended approximately $50,000.00 on capital improvements to the leasehold premises. None of these costs were necessary for the short term occupation of the premises by Pomodoro, but were constructed so that Pomodoro could benefit therefrom over the extended term.

Based upon the prior discussion with Mr. Johnson, and the statement to Mr. Johnson that Pomodoro's undertaking of the improvements would mean that Pomodoro would be renewing the lease, Pomodoro did not believe that any further written notice was required or necessary. By virtue of Mr. Johnson's letter dated September 3, 1997, Pomodoro was specifically advised that Hillside expected a written notice of Pomodoro's intention to renew the Lease. Accordingly, Pomodoro immediately complied with Hillside's demands by letter dated September 8, 1997. Pomodoro's failure to have delivered a written notice of exercise prior to September 2, 1997, was the result of Pomodoro's honest and sincere belief that all acts necessary to exercise the renewal terms had been accomplished. No further thought was given to the matter until Mr. Johnson's letter of September 3, 1997.

E. Hillside waived any requirement that lease renewal be evidenced by any writing.

It is well understood that the necessary elements of waiver include: (1) an existing right; (2) knowledge of the existence of that right; and (3) an intention to relinquish the right. Soter's, Inc. v. Deseret Fed. Sav. & Loan, 857 P.2d 935 (Utah 1993). The Soter's ruling was reviewed and clarified by the Geisdorf decision. However, as applied to this case, the doctrine of waiver is not only available, but the trial court is obligated to review all relevant facts bearing on the issue of waiver before making its decision.

Clearly, the Lease described a renewal procedure which required a written notice of exercise, and Hillside was fully aware of this provision. Pomodoro submits that it is equally clear that Hillside knew that Pomodoro would be exercising the renewal option if it undertook to construct the capital improvements to the leasehold premises. Once the improvements had begun and were completed, all without objection or comment by Hillside, Hillside could be deemed to have waived its rights to receive a written notice of the option to renew the Lease. At the least, Pomodoro should be entitled to an evidentiary hearing by the trial court with regard to the waiver issue. Unlike the Geisdorf case, the trial court has not had the opportunity to receive a full expression of the facts, and the facts in this case are critical to a full understanding of Pomodoro's waiver claim as well as the application of any other equitable principle. As stated in Living Scriptures, Inc. v. Kudlik, 890 P.2d 7 (Utah App. 1995).

> The net effect is that the doctrine of waiver is a 'highly fact-dependent question, one that we cannot profitably review de novo in every case because we cannot hope to work out a coherent statement of the law

> through a course of such decisions' Trolley Square Assocs. v. Nielson, 886 P.2d, 61 (Utah App. 1994) State v. Pena, 869 P.2d 932 (Utah 1994). Thus, we now grant very broad discretion to the trial court's application of legal propositions to the facts in waiver cases Pena, 869 P.2d at 938.

Thus, the waiver issue in this matter should be initially referred to the trial court for a review and decision. Certainly, the doctrine as restated in Geisdorf should be applied, but the trial court should have the benefit of an evidentiary hearing and the ability to weigh all relevant facts before entering any ruling. Neither the trial court nor this appellate court should be deemed to be properly exercising its discretion if the waiver question were to be decided based upon the modest record thus far developed. Pomodoro is entitled to an opportunity to fully present the relevant facts.

III. THE CONDUCT OF THE PARTIES ESTABLISHED A COURSE OF DEALING WHICH MODIFIED OR AMENDED THE LEASE TO ELIMINATE ANY REQUIREMENT THAT THE RENEWAL OPTION BE EXERCISED IN WRITING.

It is well settled that parties to a contract have a right to rely upon the manner in which the parties have transacted with one another in determining a particular course of conduct.

> . . . To comply with his obligation to perform a contract in good faith, a party's actions must be consistent with the agreed common purpose and the justified expectations of the other party. The purpose, intentions and expectations of the parties should be determined by considering the contract language and the course of dealings between and conduct of the parties. (emphasis added) St. Benedict's Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194 (Utah 1991).

Pomodoro has plead, and would intend to demonstrate at trial, that, in the course of dealing between Pomodoro and Hillside, Pomodoro had a reasonable expectation that the written notice requirement of the renewal provisions of the Lease would not be enforced. Hillside

had not required strict compliance with other provisions of the Lease and Pomodoro had verbally informed Hillside of its intentions with regard to the lease renewal provisions. Accordingly, Pomodoro reasonably assumed that the written notice requirement of the Lease would be waived by virtue of the manner in which Hillside had acted in response to other matters under the Lease and in light of Hillside's knowledge that Pomodoro would only construct the capital improvements if it were to exercise its option to renew and be a tenant for the extended term.

CONCLUSION

The trial court granted summary judgment against Pomodoro because the trial court believed that Pomodoro was required to strictly comply with the renewal provisions of the Lease, and that no equitable arguments were relevant. Pomodoro submits that the trial court, in reaching this decision, misinterpreted the holding of the I.X.L. case. Pomodoro's contentions are buttressed by the recent Geisdorf ruling which clearly requires the trial court to evaluate any asserted principles of equity before reaching a judgment. On this basis alone, Pomodoro is entitled to a remand.

Further, Pomodoro has a right to have a review of those facts which Pomodoro believes support the application of the doctrine of waiver. Such facts should be presented in a trial proceeding, rather than be limited to affidavits. Additionally, at trial, Pomodoro should be entitled to present its argument regarding the course of dealing between the parties.

Pomodoro submits that the trial courts Summary Judgment should be reversed and this case should be remanded to the trial court for an evidentiary hearing.

DATED the 21 day of December, 1998.

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Pomodoro Partnership

CERTIFICATE OF SERVICE

I hereby certify that on the 22 day of December, 1998, four (4) true and correct copies of the foregoing Brief of Appellant Pomodoro Partnership were hand delivered to the following person:

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No Addendum Necessary.